

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

GUY MCEACHIN,

Petitioner,

v.

**Civil Action No.
9:08-CV-17 (TJM)**

**JAMES T. CONWAY, Superintendent,
Attica Correctional Facility,**

Respondent.

APPEARANCES:

FOR THE PETITIONER:

GUY MCEACHIN, 00-A-5257
Petitioner *Pro Se*
Attica Correctional Facility
P.O. Box 149
Attica, New York, 14011

FOR THE RESPONDENT:

HON. ANDREW M. CUOMO
Attorney General for the State of New York
120 Broadway
New York, New York 10271

LEILANI J. RODRIGUEZ, ESQ.
Assistant Attorney General

**THOMAS J. MCAVOY,
SENIOR U.S. DISTRICT JUDGE**

ORDER

Guy McEachin (“Petitioner”) filed an amended petition for a writ of a habeas corpus on March 17, 2008, alleging that his February 7, 2005 conviction in Franklin County Court was unconstitutionally obtained. *See* Dkt. No. 5. Petitioner asserted in his amended petition that he had not exhausted two of his claims: (1) that the trial court failed to inform him that the

dangerous contraband statute is unconstitutionally vague (Ground Three, ¶12(C)); and (2) that the trial court erred when it permitted him to proceed *pro se* because he was under the care of the “office of mental health” and was taking prescribed medication. (Ground Four, ¶12(D)). Dkt. No. 5 at pp. 4-6. Petitioner further stated that a motion to vacate his conviction pursuant to New York’s Criminal Procedure Law (“CPL”) § 440.10, in which these claims have been raised, is pending in state court. *Id.* at p. 4, ¶ 11(c); p. 6, ¶ 13.

By Order dated June 16, 2008, Petitioner was directed to file an affidavit advising the Court regarding whether he wished to (1) withdraw the unexhausted claims; (2) withdraw the entire petition pending exhaustion of the unexhausted claims; or (3) file a motion to stay his amended petition. Dkt. No. 9. Petitioner was further ordered to provide the Court with the dates upon which each of his CPL § 440 motions had been filed and denied. *Id.* Petitioner has not complied with that Order, which explicitly advised him that his failure to comply “within thirty (30) days” of the filing date of the Order would “result in the automatic dismissal of the petition.” Dkt. No. 9 at 6. Accordingly, the petition is dismissed without prejudice.¹ *See Baker v. Poole*, No. 07-CV-0512, Dkt. No. 3 (N.D.N.Y. Jun. 1, 2007)(Scullin, J.)(habeas petition dismissed, without prejudice, where a CPL § 440 motion was pending in state court); *Foster v. Spitzer*, No. 07-CV-0103, 2007 WL 1531904 (N.D.N.Y. Mar. 5, 2007)(Kahn, J.)(habeas petition dismissed where petitioner had not yet completed state appellate review of his claims); *Hendricks v. West*, No. 05-CV-925, 2005 WL 3097898, at *1-2 (N.D.N.Y. Nov. 17, 2005)(Scullin, J.)(habeas petition dismissed, without prejudice, for failure to exhaust state

¹ The June 16, 2008 Order further advised Petitioner that “The dismissal shall not constitute a dismissal on the merits for purposes of 28 U.S.C. § 2244(b) and therefore would not preclude the filing of another petition.” Dkt. No. 9 at 6.

court remedies where a CPL § 440 motion was pending in state court); *Berry v. Superintendent*, No. 05-cv-760, 2005 WL 1660116, at *1-2 (N.D.N.Y. Jul. 7, 2005)(Scullin, J.)(same); *Ruine v. Senkowski*, No. 00 Civ. 3798, 2000 WL 1530020, at *2 (S.D.N.Y. Oct. 16, 2000) ("if a § 440 motion is pending, state court remedies have not yet been exhausted, and the habeas petition must be dismissed."). Petitioner is granted leave to re-file within the statute of limitations period once his state court remedies have been exhausted.²

WHEREFORE, it is hereby

ORDERED, that this action is **DISMISSED WITHOUT PREJUDICE**; and it is

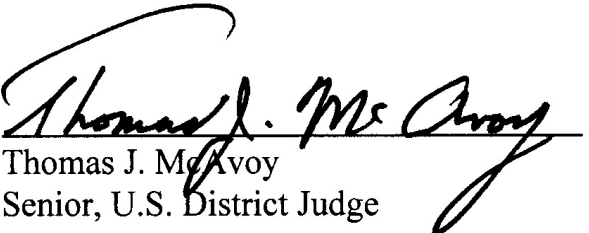
ORDERED, that the Clerk is directed to serve a copy of this Order in accordance with

the Local Rules upon Petitioner, the Respondent

and the Attorney General of the State of New

York.

IT IS SO ORDERED
Dated: August 7, 2008


Thomas J. McAvoy
Senior, U.S. District Judge

² The Court advises Petitioner that he must file his petition for habeas relief within one year of the judgment of conviction becoming final. 28 U.S.C. § 2244(d)(1). A judgment of conviction becomes final at the conclusion of the ninety days during which the party could have sought certiorari in the United States Supreme Court. *Williams v. Artuz*, 237 F.3d 147, 151 (2d Cir. 2001). *See also Hughes v. Irvin*, 967 F. Supp. 775, 778 (E.D.N.Y. 1997) (citing Rule 13 of Rules of the Supreme Court of the United States); *Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986) (holding that decision becomes final "where . . . the availability of appeal [is] exhausted, and the time for petition for certiorari ha[s] elapsed" (quotation omitted)). However, 28 U.S.C. § 2244(d)(2) provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). *See Williams v. Breslin*, No. 03 Civ. 1848, 2004 WL 242447, at *2 (S.D.N.Y. Feb. 11, 2004) (quoting *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000)(*per curiam*), *cert. denied* 531 U.S. 840 (2000)). To avoid any problems with the statute of limitations, Petitioner should file any renewed § 2254 habeas petition **promptly** after disposition of the pending action in state court.

